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PROPERTY LAW IN SCOTLAND: CONTRASTS WITH QUÉBEC

DROIT DES BIENS EN ÉCOSSE: CONTRASTES AVEC LE QUÉBEC

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1. An early start

Royal Mines Act 1424

Gold and silver reserved to the Crown.

Leases Act 1449

Of Takis of Landis for Termes

Item it is ordanit for the sauftie and fauour of the pure pepil that labouris the grunde that thai and al utheris that has takyn or sal tak landis in tym to cum fra lordis and has termes and yeris thereof that suppose the lordis sel or analy thai lans that the takeris sal remain with thare tackis on to the isch of thare termes quahis handis at euer thai landis cum to for sik like male as thai tuk thaim of befoir.

Registration Act 1617

Oure Souerane Lord Considdering the gryit hurt sustened by his Maiesties Liegis by the fraudulent dealing of pairties who haveing annaliet thair Landis and ressaut gryit soumes of money thairfore Yit be thair vniust concealing of sum privat Right formarie made by thame rendereth subsequent alienatioun done for gryit soumes of money altogidder vnprofitable whiche can not be avoyded vnles the saidis privat rightis be maid publick and patent to his hienes liegis FOR remedie whereoff and of the manye Inconvenientis whiche may ensew thairupoun HIS Maiestie with aduyis and consent of the estaittis of Parliament statutes and ordanis That thair salbe ane publick Register In the whiche all Reuersiounes regresses bandis and writtis for making of reuersiounes or regresses assignatiounes thairto dischargis of the same renunciatiounes of wodsettis and grantis off redemptioun and siclyk all instrumentis of seasing salbe registrat.

<http://www.statutelaw.gov.uk/>

2. The reception of Roman law

Seventeenth and eighteenth centuries. Institutional writers.

Sir James Dalrymple, 1st Viscount Stair, *Institutions of the Law of Scotland* (1681).
John Erskine of Carnock, *An Institute of the Law of Scotland* (1773).

3. The English influence

Union of the Crowns 1603.

Treaty of Union 1707.

I. "That the two Kingdoms of Scotland and England shall upon the first day of May next ensuing the date hereof, and forever after, be united into one Kingdom by the name of Great Britain..."

XVIII. "The laws which concern public right policy and civil government may be made the same throughout the whole United Kingdom, but that no alteration be made in laws which concern private right, except for evident utility of the subjects within Scotland."

XIX "That the Court of Session, or College of Justice, do after the Union and notwithstanding thereof, remain in all time coming within Scotland as is now constituted by the laws of that Kingdom, and with the same authority and privileges as before the Union ... And that no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other court in Westminster Hall..."

The House of Lords as final civil court of appeal.

"But if such be the law of England, on what ground can it be argued not to be the law of Scotland?" *Bartonshill Coal Co v Reid* (1858) 3 Macq 266.

Quasi-codification of commercial law in the late nineteenth century.

Bills of Exchange Act 1882.

Sale of Goods Act 1893 (now 1979).

4. The modern era

(a) Growth in academic scholarship

K G C Reid, *The Law of Property in Scotland* (1996).

D Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* (2nd edn, 2005).

W M Gordon and S Wortley, *Scottish Land Law* (3rd edn, vol 1, 2009).

(b) Interest in mixed legal systems

R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004).

E C Reid and V V Palmer (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009).

(c) Constitutional change

Scotland Act 1998 – establishment of Scottish Parliament.

<http://www.scottish.parliament.uk/>

Human Rights Act 1998 - direct enforceability of the European Convention on Human Rights in UK Courts. Article 1 Protocol 1 (property protection).

Constitutional Reform Act 2005 – replacement of House of Lords as highest civil court of appeal for Scotland with new UK Supreme Court in October 2009.

<http://www.supremecourt.gov.uk/>

(d) Property law becomes more statutory – quasi-codification?

Abolition of Feudal Tenure etc (Scotland) Act 2000 – land now owned absolutely.

Title Conditions (Scotland) Act 2003 – codification of real burdens (perpetual positive and negative conditions affecting land).

Tenements (Scotland) Act 2004 – codification of apartment ownership.

All three came into force on 28 November 2004.

Conveyancing and Feudal Reform (Scotland) Act 1970 – codification of mortgage law.

Land Registration (Scotland) Act 1979 – register of title based on English model, to be substantially overhauled – see Scottish Law Commission, Report on Land Registration (2010) available at <http://www.scotlawcom.gov.uk/>

Land Reform (Scotland) Act 2003 – right to roam.

(e) European harmonisation

European Union.

C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law : Draft Common Frame of Reference (DCFR)*, (2009).

http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf

Book I	General provisions
Book II	Contracts and other juridical acts
Book III	Obligations and corresponding rights
Book IV	Specific contracts and the rights and obligations arising from them
Book V	Benevolent intervention in another's affairs
Book VI	Non-contractual liability arising out of damage caused to another
Book VII	Unjustified enrichment
Book VIII	Acquisition and loss of ownership of goods
Book IX	Proprietary security in movable assets
Book X	Trusts

5. Some contrasts between property law in Scotland and Québec

(a) No code

But for how much longer?

(b) No real French influence

Language issues.

(c) No statutory definition of ownership

Québec Civil Code art 947.

La propriété est le droit d'user, de jouir et de disposer librement et complètement d'un bien, sous réserve des limites et des conditions d'exercice fixées par la loi.

Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law.

But, Erskine, *Institute* II.i.1.

[Ownership is] the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction.

DCFR VIII. – 1:202.

“Ownership” is the most comprehensive right a person, the “owner”, can have over property, including the exclusive right, so far as consistent with applicable law or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover property.

(d) No statutory neighbour law

Québec Civil Code art 976.

Les voisins doivent accepter les inconvénients normaux du voisinage qui n'excèdent pas les limites de la tolérance qu'ils se doivent, suivant la nature ou la situation de leurs fonds, ou suivant les usages locaux.

Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.

But common law nuisance. *Plus quam tolerabile*. Eg *Webster v Lord Advocate* 1985 SLT 361.

(e) No superficies

Québec Civil Code art 1011

La propriété superficière est celle des constructions, ouvrages ou plantations situés sur l'immeuble appartenant à une autre personne, le tréfoncier.

Superficies is ownership of the constructions, works or plantations situated on an immovable belonging to another person, the owner of the subsoil.

But limited recognition of “separate tenements”. See *Compugraphics International Ltd v Nikolic* [2009] CSOH 54 available at <http://www.scotcourts.gov.uk/opinions/2009csoh54.html>

(f) Servitudes

Québec Civil Code art 1177.

Cette charge oblige le propriétaire du fonds servant à supporter, de la part du propriétaire du fonds dominant, certains actes d'usage ou à s'abstenir lui-même d'exercer certains droits inhérents à la propriété.

Under the charge the owner of the servient land is required to tolerate certain acts of use by the owner of the dominant land or himself abstain from exercising certain rights inherent in ownership.

In Scotland under the Title Conditions (Scotland) Act 2003, obligations to abstain must be constituted as real burdens.

(g) Trusts

Québec Civil Code art 1261.

Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d'entre eux n'a de droit réel.

The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settler, trustee or beneficiary and in which none of them has any real right.

Stair, *Institutions* I.xiii.7

The property of the thing intrusted, be it land or moveables, is in the person of the intrusted, else it is not a proper trust.

6. Conclusions